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D. Bengtson
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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-188898

DATE: February 27, 1978

MATTER OF: Info-Dyne, Inc.

DIGEST:

1. Although contracting agency has indicated that number of items were excluded from cost evaluation of proposals because they were unknown or variable, record indicates that in making award agency was able to make estimate for items for purpose of fixing ceiling on contract price so that agency could and should have made estimates for cost evaluation purposes also; however, protester does not appear to have been prejudiced by agency's failure.
2. Contracting agency is not required to hold discussions with offeror originally in competitive range when it is determined after receipt of revised proposals that offer is outside competitive range.
3. Offeror who has had buyer-client relationship with remote computing service vendors, has no ownership connection with them, and has performed consulting work, published reports and conducted seminars for them provides no legal basis to object to validity of "statement of nonaffiliation" which is to affirm that offeror has independence from remote computing service vendors and is beyond their control.

Info-Dyne, Inc., protested the award of a contract to Real Decisions Corporation (RDC) under request for proposals (RFP) H-4175, issued by the Department of Housing and Urban Development (HUD), Washington, D.C., for the development of a computer benchmark package for the purpose of enabling HUD

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to select the lowest-cost vendor from firms qualified under GSA's Teleprocessing Services Program.

The RFP called for a system designed to estimate the costs to the Government of having various remote computing service vendors provide teleprocessing services for HUD's Mortgage Insurance Accounting systems. After submission of the benchmark and related items, the contractor is required to attend benchmark tests and evaluations over a 17-week period. The RFP indicated that HUD did not know either the location or number of benchmark demonstrations that a contractor would have to attend.

Although several proposals were received, only Info-Dyne and RDC were determined to be technically acceptable. Initially, both firms were provided an opportunity to revise their proposals. However, they chose only to amend their technical proposals. Since neither firm was deemed to be technically superior, cost became the deciding factor under the "Cost" evaluation provision in the RFP. RDC's proposal was the lower of the two received. Based upon a cost analysis of the two proposals, HUD decided that RDC had the clear advantage in price and that there would be no reason to negotiate further with Info-Dyne. Negotiations were then conducted with RDC which resulted in a \$2,873.26 reduction in its proposal. Award was made to RDC in the amount of \$68,298.74.

Info-Dyne protested the award on the basis that the cost evaluation was improper, that it had received a reduced price from a subcontractor and it was not afforded the same opportunity as RDC to change its price proposal as a result of the reduction, that its cost should have been evaluated at \$67,187, which is less than the award price, and that a substantial portion of its contract performance was to be completed by personnel and a subcontractor located in the Washington, D.C., area so that travel costs for performance would be less than RDC's.

Although HUD has indicated that a number of items were excluded from the cost evaluation of proposals because they were unknown or variable, the record indicates that in making an award HUD was able to make an estimate for those items for the purpose of fixing a ceiling on the contract price. Thus, HUD could and should have made estimates for cost evaluation purposes also. However, Info-Dyne does not appear to have been prejudiced by the omission. HUD has indicated that the RDC cost proposal on the known and fixed cost items was so much lower than the Info-Dyne cost proposal that when the contingency factor is applied, even without including any travel costs for Info-Dyne, RDC remains the low offeror. Further, HUD has pointed out that the \$57,187 evaluated price to which Info-Dyne refers does not include all the contingencies in the RDC contract and therefore is not a good comparison.

With respect to Info-Dyne's contention that it should have been allowed the same opportunity as RDC to change its cost proposal, it appears that, while Info-Dyne originally was considered to be in the competitive range with RDC when it was first accorded an opportunity to revise its proposal, upon consideration of the revised proposals a determination was made to exclude Info-Dyne from the competitive range based on RDC's price advantage. In that regard, a contracting agency is not required to hold discussions with an offeror originally in the competitive range when it is determined after the receipt of revised proposals that the offer is outside the competitive range. See 52 Comp. Gen. 198, 208 (1972).

While Info-Dyne has indicated that, if it was invited to participate in negotiations, it would have been able to reduce its price proposal because of a reduction received from a subcontractor, there is nothing to indicate that the contracting agency was aware of the price reduction and the decision to exclude Info-Dyne based on RDC's price advantage

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and the view that Info-Dyne could not effect a significant price reduction through negotiation does not appear unreasonable.

Moreover, Info-Dyne has stated that the key element in its protest hinges on HUD's acceptance of the RDC statement of nonaffiliation with remote computing service vendors. In that regard, the RFP stated:

"The contractor's proposal must include a biographical brief of each person to be involved in the benchmark effort. The resume must include details of any personal business, or professional affiliations the person has, or expects to have, with any remote computing service vendor. The proposal should also include 'a company statement of non-affiliation' which affirms explicitly that company's independence from remote computing service vendors and their influence."


Info-Dyne indicated that it expected our Office to make an independent investigation of its charges that RDC was in violation of the statement of non-affiliation. However, it is the responsibility of the protester to present evidence sufficient to affirmatively establish its position. It is not the practice of our Office to conduct investigations pursuant to our bid protest function for the purpose of establishing the veracity of a protester's speculative statements. Mission Economic Development Association, B-182686, August 2, 1976, 76-2 CPD 105.

We did furnish to HUD the names of the individuals who Info-Dyne stated would support its contention that RDC was not independent from remote computing service vendors and their influence as required by the RFP. HUD contacted the individuals and the information furnished by them did not substantiate the contentions made by Info-Dyne.

The purpose of the "statement of nonaffiliation" is to affirm that the offeror has "independence from remote computing service vendors" and is beyond "their influence." HUD has indicated that this is to preclude a conflict of interest between the offeror and the remote computing service vendors because of the effect the conflict could have on the whole program. While Info-Dyne has placed a great deal of emphasis upon the term "affiliation," the significant terms are "independence" and "influence." Under the terms of the clause there is "nonaffiliation" where there is "independence" and freedom from "influence." Thus, where the offeror is beyond the control and power of the remote computing service vendors so that it is free to exercise its own judgment under the contract, it is not affiliated with the remote computing service vendors.

From HUD's findings, it appears that RDC had a buyer-client relationship with other service vendors. HUD found no ownership connections when investigating RDC's business dealings with service vendors. Further, consulting work done by RDC for some of the service vendors mentioned by Info-Dyne was obtained by using competitive procurement procedures. Also, the fact that RDC performed consulting work, published reports and conducted seminars for computer service vendors does not establish that RDC is under the control or power of the vendors for which it has worked so that it is not free to exercise its independent judgment under the contract. Under the circumstances, we find no legal basis to object to the validity of RDC's statement of nonaffiliation.

In view of the foregoing, the protest is denied.


Deputy Comptroller General
of the United States